JD--98--03
Grand Rapids, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL 7, SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, AFL-CIO

and GR–7–CC–1767

ANDY J. EGAN CO., INC.

Jamie VanderKolk, Esq.,
for the General Counsel.
Timothy J. Ryan, Esq.,
(Miller, Johnson, Snell, & Cummiskey)
of Grand Rapids, Michigan, for the Charging Party.
Tinamarie Pappas, Esq.,
of Ann Arbor, Michigan, for the Respondent.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises out of a complaint and notice of hearing (complaint) issued on February 10, 2003,[1] against Local 7, Sheet Metal Workers' International Association, AFL-CIO (the Union). The complaint alleges that the Union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act) by engaging in conduct that had an object of forcing or requiring Andy J. Egan Company, Inc. (Egan) to cease doing business with Target Construction Inc. (Target), a nonunion company with which the Union has a labor dispute. The sole jobsite directly relevant to this proceeding is the DeVos Place Convention Center project, Grand Rapids, Michigan (the project), at which Hunt Construction Group, Inc. (Hunt) is the general contractor.

Pursuant to notice, I conducted a trial in Grand Rapids, Michigan, on May 19 and 20, at which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

The General Counsel's witnesses were Casey Schellenboom, Egan's vice president and treasurer; David Hartwell and Bernard Holtrop, job foremen for Target; and William Sewall, Hunt's construction manager at the project. Schellenboom and Holtrop were also called by Egan, as was Neal Biggs, a project safety manager for Hunt.

The Union called Richard Fuller, union business manager; Doug Adams, union business representative; Tim Caron, a union organizer; pickets Thomas Cox and Jack Gould; and Bob Seifert, a supervisor for Elite Security Services.

All parties filed helpful posthearing briefs, which I have duly considered.

[1] All dates are in 2003, unless otherwise indicated

Issues

Whether the Union, in furtherance of its labor dispute with Target, and with an object of forcing or requiring Egan to cease doing business with Target, engaged in the following conduct:

1) As alleged in paragraph 11 of the complaint, threatened Egan on or about November 22 and December 2, 2002, that it would picket all of its jobsites unless Egan ceased doing business with Target. This relates to two telephone conversations between Fuller and Schellenboom.

2) As alleged in paragraph 13, violated the reserve gate system Hunt established at the project, by maintaining pickets at Gate 5, on about January 6; and at the driveway approach to Gate 8, from January 6–January 10.

3) As alleged in paragraph 14, maintained pickets at a pedestrian bridge utilized by employees of contractors and persons other than Target.

The Union denies that Fuller threatened Schellenboom and that its picketing had a secondary object. Rather, the Union argues that it was engaged in a lawful primary picket of Target.[2]

On the entire record, including my observations of the witnesses and their demeanor, I make the following

Findings of fact

Egan, a Michigan corporation with an office and place of business located in Walker, Michigan, is engaged in the construction industry in the design and construction of commercial heating, cooling, plumbing, and refrigeration systems. It has a contract with the Union. Target, a Michigan corporation with an office and place of business in Rockford, Michigan, is a nonunion sheet metal contractor in the construction industry. Egan and Target are employers engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) and 8(b)(4) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

The $200 million convention center project covers approximately seven acres in downtown Grand Rapids. At the project, Hunt employs over 90 subcontractors and sub-subcontractors, including Egan, which began performing work there in February 2001 and has always used Target as its sheet metal subcontractor. At the time of the Union's alleged unfair labor practices, Egan was working on about six large projects, four of which were using unionized sheet metal subcontractors.

I. Prepicketing events

Both Caron and Adams testified about how the Union reached the conclusion that Target did not pay union scale wages and benefits. In Caron's role as an organizer, he visits nonunion jobsites, including Target's, and talks with employees. He has been to numerous Target sites,

[2] During these proceedings, counsels at different times have called the picketing "informational" and/or "area standards." The picket signs used area standards language. In any event, the distinction is not material for purposes of this decision.

where he has asked its employees if they are journeymen or apprentices and has discussed wages with them. No Target employee has ever disagreed that the Union pays more than Target. One Target employee told Caron that he was making $17 an hour, considerably below the union scale. Adams also spoke to a Target employee, Gene Kline, who said he made less than scale.

Caron and Adams also testified about conversations they have had with Holtrop on the subject of Target's wages. Thus, before the picketing started, Caron spoke with Holtrop about the wages of Holtrop's sons, both journeymen who work for Target. According to Caron, Holtrop said, "You know, my sons aren't doing too bad, they're both making about 18 bucks an hour" (Tr. 256).[3]

Adams testified that Holtrop is his neighbor, and they speak often. In late 2000 or early 2001, Adams was handing out a flier with the Union's wage package on it. Holtrop said he was getting a wage review at Target soon and wanted to get as close to the union wage as possible. Adams also spoke with Holtrop's son Jamie in the summer of 2001. Jamie was working at a prevailing wage job at the time and pulled out his paycheck to show Adams that he was taking home more than a union worker. Adams explained that Jamie was getting more money in his paycheck because the benefits were different from the union's. When Adams asked if he would like to make the union rate all the time, Jamie said yes.

Holtrop testified that he did not know what his sons make at Target. Further, he has worked for Target for 10 years, and the only time he made less than union rate was during the first 6 months of his employment. Adams offered him a union job, and he replied that he would need to take a pay cut to come back to the Union. On cross-examination, when asked what his wage rate was in the fall of 2002, Holtrop evaded giving a direct answer by stating that the matter had to be looked at as a (wages and benefits) package and that he could not give an answer without doing the math. Significantly, he did not give any specific figures, only stating that his total package was "right up in the ball park" (Tr. 426).

I credit Caron's and Adams' testimony about their receipt of information about Target's compensation to its employees. Neither of them appeared to be exaggerating the extent of their inquiries into the matter, which were certainly not impressively extensive. Further, since neither Jamie Holtrop nor Kline was called as a witness, Adams' testimony concerning his conversations with them went uncontroverted. Finally, Holtrop's credibility was considerably undermined by his evasiveness in not answering what his wage rate was and by his failure to state any kind of figure on the record.

In late 2002, Egan was awarded the mechanical work on a new facility for the Grand Rapids Press (the Press). Egan initially intended to subcontract the sheet metal work to a union company located some distance from Grand Rapids. However, the Press wanted Egan to use a local company, and Egan then agreed to use Target.

On November 21, 2002, Adams called Schellenboom. According to the latter, Adams stated he was disappointed that Target had been awarded the mechanical work on the Press project, when a unionized company had been the lowest bidder. Schellenboom explained the above.

[3] The union wage for journeymen is $24.07 an hour plus benefits.

At around this time, Fuller and Schellenboom had two telephone conversations, both initiated by Fuller. Schellenboom put the dates as November 22 and December 2, 2002, whereas Fuller testified the first occurred "Sometime . . . in November," and the second, a week or two after that (Tr. 397, 400). Contrary to the Union's contentions (Br. at pp. 16, et. seq.), I find no insufficiency in the evidence that these two specific conversations took place between Fuller and Schellenboom. I find it immaterial whether or not they occurred on the exact dates related by Schellenboom.

In the first conversation, both Fuller and Schellenboom recalled that the former stated he was upset that Target had been awarded the Press job and believed that Schellenboom was responsible for the decision. Schellenboom denied this, saying that the Press made it. Fuller stated he would make further inquiries on the matter.

Schellenboom further testified that in this conversation, Fuller also said that he was "fed up" with Egan using open shop subcontractors and that the Union would picket if necessary to get Egan to stop using them (Tr. 122-123). Fuller denied that in this conversation, he threatened Schellenboom in any way.

On November 26, at a union meeting, the Union's leadership discussed taking action against Target. Fuller and Caron testified that members asked why Egan was not being targeted. Fuller responded that the Union could not take action against Egan because it would be secondary boycotting and also because Egan is a union contractor. The leadership did not mention a picket against Egan.

A week or so later, Fuller called Schellenboom again. Their versions of this conversation were radically different. According to Schellenboom, Fuller said that he was still upset that Egan had awarded the Press job to Target and that the Union was going to picket all of Egan's jobsites, that soon Egan would be "begging" to use union sheet metal workers, and that the Union was "going to bring Andy Egan Company to their knees" (Tr. 124–125). Fuller also asked for the name of a contact at the Press, which Schellenboom gave him. Schellenboom stated that he was going to call Douglas Bennet, the business manager for the Plumbers and Pipe Fitters Union, and ask Bennet to call Fuller about this. Fuller then made disparaging remarks about Bennet. The only one Schellenboom could specifically recall was that Fuller called Bennet "an anti-union son of a bitch" (Tr. 126).

In contrast, Fuller's testimony was that he told Schellenboom he had verified through a contact at the Press that the Press made the decision to award the work to Target. He candidly testified that he "might" have told Schellenboom the specific locations where picketing against Target was planned, including the convention center project (Tr. 402). He denied making any threats against Egan, stating that he made it "real clear" that the picketing would be directed against Target (ibid).

Soon after this call, Schellenboom sent an email to Bennet, in an effort to enlist his help in preventing any picketing against Egan.[4] The email discussed the events of a union meeting, as related to Schellenboom by Michael Fish, an employee of a subcontractor, and two others whose names he did not know. Fish told him that at a union meeting on November 26, there was an action to fund pickets on Egan jobsites.[5] The email states that at this meeting, the

[4] Co. Exh. 1.

[5] However, Adams testified that he checked the roster of names of people present at the November 26 meeting, and Fish was not listed.

Union announced plans to set up pickets against Target at Egan jobsites and that Egan would be brought to its knees.

Schellenboom's email made no mention whatsoever of Fuller's threats to picket. On cross-examination, Schellenboom agreed that to be effective in enlisting Bennet's help, he wanted his email to include his strongest evidence that the Union was planning to picket Egan. Schellenboom's explanation of why he did not include these threats in the email was that he did not want Bennet to know that Fuller had disparaged him.

I find wholly unconvincing Schellenboom's explanation for his failure to mention Fuller's alleged threats in his email to Bennet. This would have been by far the strongest evidence of unlawful secondary intent, coming directly from an official of the Union. Second, Schellenboom could have related Fuller's threats without mentioning Fuller's remarks disparaging Bennet. Third, despite Schellenboom's testimony that Fuller made derogatory remarks, he could specifically recall only one. Finally, it strikes me as unlikely that Fuller, had he in fact made disparaging comments about Bennet, would have referred to the official of a sister union as "antiunion," as Schellenboom contends.

I also find an inherent contradiction in Schellenboom's testimony. Thus, although he testified that Fuller made express and unequivocal threats to picket Egan, he also testified that at the time he sent the email, he did not know if the picketing was going to be against only Target, or against Egan as well. Crediting his version of what Fuller said in the two telephone conversations, no reasonable person would have doubted the Union's intention to picket Egan.

Therefore, based on the plausibility of their respective testimony, I credit Fuller's version of what he said to Schellenboom in those conversations and find that he did not threaten to picket Egan.

II. The reserve gate system

Caron testified that he and Adams discussed picketing Target because they were concerned that the Union was losing market share in the Grand Rapids area; the Union never planned any kind of activity against Egan because Egan is a union contractor.[6]

Hunt Construction Manager Sewall testified as follows. In early January, he heard rumors that the Union was going to start picketing Egan and Target. On the morning of January 3, he called Adams, who told him that the Union's labor dispute was not with Egan but only with Target. Around 4 hours later, Sewall faxed to Adams and Fuller a memorandum detailing a gate system that was to be effective January 6.[7] Despite Sewell's conversation with Adams, this fax listed both Egan and Target as parties to the dispute and stated that Gate 7 would be reserved for employees of both companies.

Adams testified that he did not receive the fax until after 4:30 on January 3, because he was out of the office during the day. He further testified that he was confused as to why Egan's name was listed on it.

[6] Consistent with this, Cox testified that Caron called him on the morning of January 6 to participate in informational picketing against Target and made no mention of Egan.

[7] GC Exhs. 4 & 5, respectively. At about the same time, Sewall faxed a similar memorandum to all subcontractors. GC Exh. 3.

Sewall, consistent with his memoranda, implemented a reserve gate system on the early morning of January 6. The seven gates were numbered "2" through "8."[8] Gates 2–5 were along Monroe Avenue on the east end of the site, and Gates 6 and 7 were on Michigan Street on the north end of the site.

Gate 8 was at the northern end of a long driveway and sidewalk extending southward to Lyon Square, the southern end of the site. West of the driveway and sidewalk was a river, crossed by a pedestrian bridge used by the general public and workers at the site, who went from the parking lot to the worksite. At the end of this bridge and bordering the driveway and sidewalk was a building housing Target's offices, as well as those of Egan and other subcontractors on the project. The building had Target's name on the door, Target employees were in the offices on a daily basis, and Target trucks parked there.

Gate 7 was designated as the reserve gate. Although Adams had told Sewall that Egan was not a party to the dispute, the signs stated that Gate 7 was for the exclusive use of both Egan and Target. The signs at the other gates listed the companies that could enter through those gates. Egan's name was not on them.

III. The picketing

On the morning of January 6, Caron instructed pickets to go to Gate 7 or to the pedestrian bridge across from Target's offices, and picketing commenced. It was stipulated that all of the picket signs stated that Target paid sub-standard wages and benefits and made no mention of Egan.[9] At that time of year, employees at the site worked between 8 a.m. and 4:30 p.m.; the picketing took place between 10 a.m. and 2 p.m. Also on January 6, the Union began picketing Target's offices in Rockford. A month before the hearing in this matter, the Union began picketing another Target site in Grand Rapids.

The testimony of the various witnesses regarding the picketing that occurred on and after January 6 was generally consistent.

A. Picketing on the pedestrian bridge and in the vicinity of Gate 8

Because the facts surrounding the picketing at these locations are intertwined, I will treat them together.

Gould was one of the pickets assigned that morning to go to the pedestrian bridge. He and about four others walked on the sidewalk in front of Target's offices, about 25–50 feet back and forth. He believed they were approximately 200 feet from the entrance to Gate 8.

Sewall initially testified that on the morning of January 6, he observed two pickets heading north on the sidewalk and that they were halfway between the bridge and Gate 8, and approximately 100 feet from the entrance to Gate 8.[10] However, on cross-examination, after being shown Respondent's Exhibit 4, he changed his estimate to 200 feet from the entrance to Gate 8, and thus was consistent with Gould.

---

[8] See GC Exh. 2, a diagram (not to scale).
[9] See U. Exh. 3.
[10] See GC Exh. 6, a photograph he took.

At around noon, when Caron went over to the pedestrian bridge, security officer Seifert informed him that the pickets on the sidewalk were on private property. Caron immediately went to City Hall, where he checked public records and confirmed Seifert's assertion. He then returned and instructed the pickets to stay on the bridge.

Sewall stated that picketing continued that day on the other side of the sidewalk, between the pedestrian bridge and the amphitheatre, which is located at the end of Lyon Square. He took a picture of the pickets by the amphitheatre.[11] According to Sewall, the pickets on the bridge were twice as close to Target offices as they were to Gate 8, and the pickets he saw in the amphitheatre area to the south of the bridge were about 30 feet from the Target offices and 300 feet from Gate 8.

Gould testified that after January 6, the pickets always stayed on the bridge and never walked on the sidewalk. Both Seifert and Sewall testified consistently with Gould, and there is no contrary evidence of record.

Two Target job foremen testified about conversations with Caron. The first was Holtrop, who used the bridge to get to the Target offices and to Gate 7. While crossing the bridge, Caron told him that the Union was trying to get better wages for Target employees.

The second was Hartwell. In early January, he was outside of Gate 8 when Caron and Adams pulled up in a car. He asked what was going on, and they replied, "[W]e are not doing it against you" (Tr. 183). Caron's version was not inconsistent with Hartwell's. Thus, he recalled telling Hartwell that the dispute was not with the employees of Target but with its management for paying substandard wages. Contrary to the General Counsel (Br. at 20–21), I find the statement "[W]e are not doing it against you" too ambiguous to evidence any kind of secondary motive, even if Caron had not offered the elaboration to which he testified.

B. Picketing at Gate 5

Adams and picket Cox testified that when the pickets arrived at Gate 7, they were confused when they saw that the sign incorrectly said the gate was for both Egan and Target. Because the sign was incorrect, Adams decided they would picket at Gate 5 as well, and he, along with Cox and others, then went there. They were at Gate 5 for 40–55 minutes.

Cox testified that the pickets never moved off a public sidewalk, and that is where Sewall testified he saw them. After observing pickets at Gate 5, Sewall returned to his office, where a representative of Egan contacted him and asked that Egan be removed from the reserve gate sign because Egan was not referenced on the picket signs. Sewall drafted a letter stating that as of noon of that day, Gate 7 was reserved exclusively for Target.[12] He went back to Gate 5 and handed the letter to Adams.

The pickets then left Gate 5 and returned to Gate 7, and Egan's name on the sign at Gate 7 was covered up with duct tape.[13] There is no evidence that at any time thereafter, pickets ever returned to Gate 5.

[11] GC Exh. 11.
[12] GC Exh. 8.
[13] See GC Exh. 9.

Applicable law

Section 13 of the Act, preserving the right of employees to strike "except as specifically provided for herein," also includes the right to picket. *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 281 fn. 9 (1960). The distinction is made between picketing directed against an employer with which a union has a labor dispute—the "primary" employer—and picketing directed against entities with which the primary employer has a business relationship—neutral or "secondary" employers. Section 8(b)(4)(ii)(B) makes it unlawful for a union to engage in a secondary picket by pressuring a neutral employer to exert influence on the primary employer. *NLRB v. Operating Engineers Local 825*, 400 U.S. 297 (1971). If an object of the union's conduct is unlawful, then there is a violation even if the union also has a legitimate motivation. *NLRB v. Enterprise Assn. of Steam Pipefitters Local 638*, 429 U.S. 507 (1977).

A union's unqualified threat to picket a secondary employer, in order to force it to cease doing business with the primary employer, also constitutes a violation of Section 8(b)(4)(ii)(B). *Teamsters Local 886 (Stephens Co.),* 133 NLRB 1393, 1395 (1961).

At worksites where there is more than one employer, picketing must be structured to have as little an effect as possible on secondary employees and their employers. *Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB 253, 256 (1972). General contractors usually seek to accomplish this on a jobsite by the implementation of a reserve gate system, whereby one entrance to the site is set aside for the exclusive use of the traffic of the primary employer. *Local 761,Int'l. Union of Electrical Workers v. NLRB (General Electric)*, 366 U.S. 667 (1961). All other employers at the site use a different entrance, the purpose being to prevent the union from exerting pressure on neutral or secondary employers.

In analyzing reserve gate situations, the Board employs the framework set out in *Sailor's Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950). A union's picketing is presumed to be lawful primary activity if: (1) it is "strictly limited to times when the situs of the dispute is located on the secondary employer's premises;" (2) "the primary employer is engaged in its normal business at the site;" (3) it is "limited to places reasonably close to the location of the situs;" and (4) it "discloses clearly that the dispute is with the primary employer." Ibid.

Failure to comply with any one of these elements creates a presumption that the picketing is for an unlawful purpose. *Electrical Workers IBEW (W.S.B. Electric)*, 269 NLRB 417, 421 (1984). Picketing at a neutral gate when a valid reserve gate system has been established violates the third *Moore* criterion, as to location. *Electrical Workers IBEW Local 98 (The Telephone Man)*, 327 NLRB 593, 600 (1999).

Even if there is full compliance with the *Moore* standards, picketing will not be found lawful if there is other evidence of secondary intent. *Electrical Workers IBEW Local 215 (Roundout Electric)*, 204 NLRB 468, 472 (1973). The "totality of a union's conduct in a given situation may well disclose a real purpose to enmesh neutrals in a dispute, despite literal compliance with the *Moore Dry Dock* standards." *Millwrights Local 1102 (Dobson Heavy Haul)*, 155 NLRB 1305, 1309 (1965). On the other hand, violation of the *Moore* criteria does not automatically create a violation of the Act. See *Electrical Workers IBEW Local 3 (Surf Hunter)*, 172 NLRB 1101, 1101-1102 (1968) (finding no violation where the union had the wrong name on pickets signs for a short period and otherwise complied with the *Moore* standards); *T.W. Helgesen v. Ironworkers Local 498*, 548 F.2d 175, 183 (7th Cir. 1977) (no violation for picketing that took place away from the reserved gate where the exact location of the public road was unclear, and the union otherwise complied with *Moore*); see also *Electrical Workers IBEW Local*

25 (Eugene Lovine), 201 NLRB 531, 531-532 (1973); *New Power Wire & Elec. Corp. v. NLRB*, 340 F.2d 71, 74 (2nd Cir. 1965).

When area standards picketing is involved, the burden is on the union to first make reasonable inquiry to determine whether or not the picketed employer is meeting area standards, wages, and benefits. Otherwise, the purported purpose of area standards picketing may be deemed pretextual, and evidence of improper motive found. *Operating Engineers Local 150 (All American)*, 296 NLRB 933 (1989); *Carpenters Local 1622 (Iacono Structural Eng'r.)*, 250 NLRB 416 (1980); *Plumbers & Pipe Fitters Local 614 (Trumbo Welding & Fabricating Co.)*, 199 NLRB 1026 (1972).

Legal analysis and conclusions

I. The Union's determination regarding area standards

Both the General Counsel and Egan contend that the Union's investigation into Target wages and benefits was a sham and reflects that its purported area standards picketing was only a pretext to engage in unlawful secondary activity.

The law does not mandate that a union follow any particular process or procedure in ascertaining the wages and benefits being paid by an employer. There is no requirement that a formal written demand be made of the employer. Nor is there any requirement that a union show its investigation rose to the level of thorough or comprehensive. Rather, a union must demonstrate only that it made "reasonable inquiry," a term not susceptible of precise definition. Clearly, when a union has neither contacted the primary employer nor sought through any other means to determine the employer's wage rates, this standard is not met. *Operating Engineers Local 150 (All American)*, supra, cited by the General Counsel, stands for this proposition. See also *Plumbers Local 130 (Quality Co.)*, 272 NLRB 1045 (1984). Moreover, the Board has held the uncorroborated statement of one employee to a union agent concerning his wage rate, standing alone, is insufficient to satisfy this burden. *Carpenters Local 1953 (T & P Iron Works)*, 266 NLRB 617 (1983). Accord: *Operating Engineers Local 571 (J.E.D. Constr. Co.),* 237 NLRB 1386 (1979), also cited by the General Counsel.

Here, in contrast, union representatives not only spoke to a number of Target employees on various occasions, but they also had conversations with Holtrop, a job foreman and agent of Target. Thus, albeit informally, they made inquiry of the employer. Therefore, I conclude that the Union's investigation into the compensation Target paid its employees, while certainly not stellar, did amount to a "reasonable inquiry" and does not give rise to an inference of illegal secondary motive.

II. Fuller's alleged threats to picket Egan

As previously stated, I credit Fuller that he did not threaten to picket Egan in his telephone conversations with Schellenboom. The General Counsel argues, however, that even if Fuller did not threaten to picket Egan, the Union still violated the Act, because in Fuller's testimony about the November conversation, he did not specifically deny stating that he was fed up with Egan using nonunion subcontractors and wanted Egan to stop using nonunion companies. The General Counsel contends that these statements should be used to infer secondary intent.

As a matter of evidence, I disagree and conclude that Fuller's failure to make a specific denial does not warrant an inference of secondary intent. Fuller expressly testified that he did

not threaten Egan "in any way" during their conversation (Tr. 399), a general denial that encompassed a denial of the specific statements Schellenboom attributed to him.

The General Counsel also argues that Fuller's testimony about the second phone conversation establishes a violation of the Act because Fuller testified that he might have told Schellenboom the locations where the Union would be picketing Target. Again, I disagree. As stated in *Food & Commercial Workers Local 506 (Coors Distributing)*, 268 NLRB 475, 478 (1983), "In cases dealing with threats to picket at a secondary employer's business, the burden is on the union to restrict its statements to the giving of notice of prospective lawful activity against the primary. Unqualified or ambiguous threats will be construed against the union as threats to the secondary's business relationship with the primary."

Here, however, Fuller's credited testimony was that he "made it real clear" that the Union's picketing would be directed against Target (Tr. 402). Any statement he made about the locations where picketing would be conducted were not unqualified or ambiguous with regard to Egan. Since Fuller expressly specified Target as the object of the picketing, such statement was neither unqualified nor ambiguous. Therefore, Fuller's failure to explicitly assure Schellenboom that the pickets would not enmesh neutral employers did not alone constitute a violation of the Act. *NLRB v. Ironworkers Local 433 (United Steel)*, 850 F.2d 551, 555–557 (9th Cir. 1988), denying enforcement 280 NLRB 1325 (1986).

For these reasons, I recommend dismissal of paragraph 11 of the complaint.

III. The Union's picketing

The General Counsel argues that the Union demonstrated unlawful secondary intent by picketing at the pedestrian bridge and at neutral gates, in noncompliance with the third *Moore* element that picketing be "limited to places reasonably close to the location of the situs."

More specifically as to the pedestrian bridge, the General Counsel argues that the Union's secondary intent is apparent because pickets stood on the pedestrian bridge utilized by the employees of secondary employers and other persons, rather than directly in front of the building in which Target's offices were located. However, there is no requirement that a union place pickets directly in front of a primary employer's offices for the picketing to be lawful. Indeed, here the building housing Target's offices was shared by Egan and other contractors, and placing pickets directly in front of the building would have increased rather than decreased the possibility of enmeshing neutrals. Additionally, it would have resulted in potential obstruction of the sidewalk and driveway leading to Gate 8. Thus, picketing in front of Target's offices would more likely have impacted neutrals than the picketing that took place on the bridge.

I conclude, therefore, that the picketing at the pedestrian bridge did not run afoul of the *Moore* standards, including criterion number 3 as to proximity to the situs of the dispute, and that the totality of circumstances does not demonstrate unlawful secondary activity at that site.

Accordingly, I recommend dismissal of paragraph 14 of the complaint.

Turning to Gate 8, the General Counsel argues that the picketing along the sidewalk in its direction shows that the Union was picketing at the gate. However, there is no evidence that the pickets ever reached Gate 8 or even got close to it. Although General Counsel's Exhibit 6 seemingly shows two pickets walking in the direction of Gate 8, at the time the photograph was

taken, the pickets were in front of the building in which Target had its offices. At no time were the pickets closer to Gate 8 than they were to Target's offices.

I conclude as to Gate 8 that the Union complied with the *Moore* criteria, including element 3. In light of this conclusion and the totality of circumstances, I further conclude that the Union did not engage in unlawful secondary activity there. I deem it particularly significant that, after learning on January 6 that the sidewalk leading to Gate 8 was private property, the pickets left the sidewalk and at all times thereafter confined their picketing to the pedestrian bridge directly across from Target's offices.

Accordingly, I recommend dismissal of paragraphs 13 as it relates to Gate 8.

Finally, I turn to the alleged unlawful picketing at Gate 5. The Union admits that its pickets were at Gate 5 for approximately 40–55 minutes on the morning of January 6. Adams claims he sent pickets to Gate 5 because of confusion when the reserve gate sign at Gate 7 listed Egan as well as Target.

The General Counsel argues that Adams's claim of confusion over the sign was not genuine because the Union received a fax stating that Egan would be listed on the reserve gate sign, along with Target. However, only hours before the gate system was set up, Adams had told Sewall that Egan was not a party to the dispute. For an inexplicable reason, Sewall nevertheless included Egan's name with Target's on the sign at Gate 7, the reserve gate. This may well have been an inadvertent error but, regardless of the reason, Adams had good cause to be confused when he saw Egan's name on the reserve gate sign.

There also is a fundamental flaw in the General Counsel's argument that the Union's picketing at Gate 5 demonstrated secondary intent aimed at Egan: at the time the picketing occurred there, Egan was not listed as a neutral contractor that could enter through that gate; rather, Egan was included with Target at Gate 7.

Significantly, as soon as the Union received notice that the gate signs would be changed to delete Egan's name from Gate 7, leaving Target as the only company to use the reserve gate, the Union immediately relocated its pickets from Gate 5 to Gate 7, and they never returned to Gate 5.

In all of these circumstances, I conclude that even if there was any technical violation of the Moore criterion with respect to location of the situs, it was inadvertent and of short duration and did not rise to the level of noncompliance. See *Electrical Workers IBEW Local 3 (Surf Hunter)*, supra (wrong name was on picket sign for several hours). Accordingly, I further conclude that the picketing at Gates 5 and 7 satisfied the elements of *Moore*, including element 3 with respect to location of the situs. The totality of circumstances does not reveal evidence of secondary motive that would rebut the resulting presumption arising under *Moore* that the picketing had a legitimate primary objective.

For these reasons, I recommend dismissal of paragraph 13 of the complaint as it relates to Gate 5.

In conclusion, the Union's picketing at the project complied with the *Moore* standards, and the totality of evidence fails to support a conclusion that the Union had an unlawful secondary intent of forcing or requiring Egan to cease doing business with Target.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.[15]

Dated, Washington, D.C. September 10, 2003

IRA SANDRON
Administrative Law Judge

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] The Union has requested costs and attorney's fees (Br. at 32). Inasmuch as no final order has issued, this matter is not now ripe for adjudication. See Section 102.148 of the Board's Rules and Regulations.